

# Reflection on Australia's Defamation Laws

The first of January, 2006... a historic day for journalists across (most of) Australia. The National Uniform Defamation Laws journalists had been striving for had finally come into place, and as the new year began, so too did a new, historic age of journalistic freedom in Australia. (this is of course, ignoring the fact these changes did not come into place until the 23<sup>rd</sup> of February 2006 in the Australian Capital Territory and the 26<sup>th</sup> of April 2006 in the Northern Territory)

Perhaps this rather rose-tinted view of the 2006 National Uniform Defamation Laws is more than a little biased. Perhaps in a fairy-tale world journalists might never again need to fear expensive, often frivolous and always mind-numbingly protracted court battles without proper reasoning, and defamation lawsuits would be reserved only for serious cases in which members of the public have had their lives ruined, or at least severely derailed, by irresponsible journalism.

Unfortunately, however, we do not live in such a world, and must instead contend with the defamation laws we did get, which, whilst a great step towards helping journalists to provide fair, balanced and generally informative reporting to the public, fell well short of giving the Australian media the necessary journalistic freedoms to perform effectively in their role as the unofficial "fourth estate" of Australian politics without fear of harsh and often incredibly costly legal reprisal.

Many experts have made compelling arguments as to why these laws are in desperate need of reform. In 2009, Professor David Rolph of the University of Sydney Law School wrote a 42 page essay entitled "A Critique of the National Uniform Defamation Laws", in which he systematically went through his many issues with the changes made by the laws, concluding that; "Although now uniform, defamation law in Australia remains unnecessarily complex and arcane and, in many respects, inefficacious."

Many critics of the NUDL have also cited the breakneck pace of technological evolution over the past 15 years, which have tremendously and continuously warped the landscape of journalism, not only in Australia but across the entire world. Australia has the same defamation laws now as it did before Google bought YouTube on the 13th of November 2006 and turned into the behemoth video-sharing platform we know today. To reiterate, these laws have not changed since the launch of WikiLeaks on the 4th of October 2006. Hell, the first iPhone wouldn't even be released until January of 2007, and we all know what an absolute game-changer that was.

According to a quarterly report by Zenith Media at the end of 2019, online media has overtaken almost every other form of advertising globally, with television projected to be overtaken some time between now and 2022, and both newspapers and magazines expected to shrink significantly. With Australia making up the 9<sup>th</sup> largest advertising market in the world as of 2019, these numbers spell a rapidly approaching doom for print media down under, and unfortunately, even the most well-intentioned journalists are still bound by their next meal ticket.

With such a rapid, game-changing and completely unforeseen shift towards the online market, and with the media industry in general taking so many unexpected, hairpin turns at this breakneck pace, it was inevitable that a few babies would begin to slosh out with the bathwater of modern innovation, and the legal system is not exactly renowned for its flexibility.

However, nearly 15 years without even the slightest alteration to Australia's defamation laws is a frankly insane prospect given these massive, earth-shattering alterations in every aspect of society. These laws are dangerously outdated and leave journalists at serious risk of financial ruin for simply doing their jobs.

So, you may ask... how much longer must journalists endure these large liabilities over libel? These serious sequela over slander? Well, in fact, a long overdue retooling of these outmoded laws has recently commenced in Australia, courtesy of the Attorney General of New South Wales, Mark Speakman.

The Defamation Amendment Bill 2020 passed both houses of parliament in New South Wales on 6 August 2020, and promises to bring Australia's standards for defamation screaming into the 21<sup>st</sup> century, enacting changes such as the need for a plaintiff to prove "serious harm" has been caused by the defendant's actions, and the introduction of a public interest defence which gives journalists the sort of fourth estate protection they have been begging for, amongst other things.

Unfortunately, though, despite being in New South Wales, the law is yet to be implemented. According to Lexicology.com "The legislation will not commence operation until a later date to be appointed by proclamation. It is currently expected that the legislation will not commence operation until all States and Territories have implemented their reform legislation. At present, no other jurisdictions have introduced defamation amendment bills."

And so, we leave our reflection on the current state of defamation legality in Australia in a state of rather nervous anticipation. We rest on the cusp of great change for journalism in Australia, and the introduction of these new laws could represent an incredible turnaround in terms of halting unnecessary litigation against journalists, but with the very real possibility of these laws being endlessly tied up in the Australian legal system. At this point, these reforms may very well be in the hands of the Australian people, and without a serious movement to bring them into effect in other states, we may very well end up spending another 15 years contending with this outdated and obsolete legal framework.

## References

- Detrixhe, J. (2017, September 11). *quartz*. Retrieved from <https://qz.com/1073970/zenith-mobile-phone-advertising-is-one-of-the-only-mediums-with-growing-market-share/>
- Karp, J. T. (2019, november 24). *The Guardian*. Retrieved from <https://www.theguardian.com/law/2019/nov/24/australias-unworkable-defamation-laws-what-the-governments-changes-could-mean>
- Rolph, D. (2009). A Critique of the National, Uniform Defamation Laws. *Torts Law Journal*, Vol. 16, No. 3,, 207-248.
- Sophie Dawson, J. P. (2020, august 26). Retrieved from Bird and Bird LLP: <https://www.lexology.com/library/detail.aspx?g=52693c67-cf8d-4999-a718-8259e5e3ca26>
- Stephens Lawyers. (n.d.). Retrieved from <https://stephens.com.au/the-uniform-defamation-laws-2006/#:~:text=The%20Uniform%20Defamation%20Laws%20make,damage%20in%20all%20Australian%20jurisdictions.>
- Whitbourn, M. (2018, december 1). *Sydney Morning Herald*. Retrieved from <https://www.smh.com.au/national/fixing-australia-s-broken-defamation-laws-20181129-p50j9z.html>
- Zenith Media. (2015, june 22). *Zenith Media*. Retrieved from <https://www.zenithmedia.com/internet-will-biggest-medium-third-global-ad-market-2017/>
- Zenith Media. (2019). *Zenith Media*. Retrieved from <https://www.zenithmedia.com/wp-content/uploads/2019/12/Global-Intelligence-10.pdf>
- Zenith Media Agency. (2019, October 7). *Zenith Media Agency*. Retrieved from <https://www.zenithmedia.com/social-media-overtakes-print-to-become-the-third-largest-advertising-channel/>